

Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO and Mustang Construction, Inc. and Pile Drivers, Bridge, Wharf and Dock Builders, Local Union 34, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 20-CD-683

December 6, 1991

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on June 28, 1991, by Mustang Construction, Inc. (Mustang), alleging that the Respondent, Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Mustang to assign certain work to employees it represents rather than to employees represented by Pile Drivers, Bridge, Wharf and Dock Builders, Local Union 34, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Pile Drivers). The hearing was held September 4, 1991, before Hearing Officer Benjamin Rodriguez.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Mustang, a North Carolina corporation doing business in California, is engaged in the construction industry, installing soil de-watering wick drains. During the 1990 calendar year, Mustang purchased and received goods valued in excess of \$50,000 from points directly outside the State of California for use at its California jobsites. Mustang and Laborers stipulated, and we find, that Mustang is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Mustang and Laborers also stipulated, and we find, that the Laborers is a labor organization within the meaning of Section 2(5) of the Act. We also find that the Pile Drivers, who did not appear at the hearing, is a labor organization within the meaning of Section 2(5), based on a previous stipulation to that effect in *Iron Workers Local 377 (Judson Steel Corp.)*, 202 NLRB 906 (1973), and the fact that the testimony and exhibits show that the Pile Drivers meets with employers concerning wages, hours, and working conditions of employees, negotiates labor contracts, and pursues

grievances based on perceived violations of these contracts. We also take administrative notice that in its brief to the United States District Court for the Northern District of California in Case C-90-3032-WHO, the Pile Drivers admitted that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Mustang has been in the business of installing soil stabilization wick drains since 1986. Mustang used pile driving equipment to perform this work until the static vibro excavation device was developed, and from that point forward it has used that device for all its wick drain installation jobs.¹

On April 14, 1986, Mustang signed a limited agreement with the Pile Drivers for the Centrum Office project, which lasted a month and a half. On this project, Mustang used traditional pile driving equipment to install wick drains and employed employees represented by the Pile Drivers Union. On August 27, 1986, Mustang began using the static vibro device to install wick drains at a project at the Oakland Airport. For this job, Mustang signed a project agreement with Laborers Local 304. From that point on, Mustang used the static vibro machine exclusively to install wick drains, and employed employees represented by the Laborers Union to perform the work in front of that machine.²

In April 1990, Mustang installed wick drains in the first of a two-phase project located in Novato, California, identified as Project 36. During this phase, the Pile Drivers filed a grievance against Mustang for using nonunion labor, and the grievance was upheld on July 24, 1990, by an arbitrator. (Mustang did not appear at the arbitration hearing.) On July 28, 1990, the United States District Court for the Northern District of California denied Mustang's motion to dismiss and affirmed the arbitrator's award.³

In April 1991, Mustang signed a master agreement with the Northern California District Council of Laborers and began work at the second phase of the Novato job, known as Project 44. Also in April 1991, Mustang was installing wick drains at a project in Rio Vista, California. On May 2, 1991, the Pile Drivers filed a grievance against Mustang pursuant to its master agreement claiming that Mustang had non-Pile Drivers employees performing Pile Drivers' work at the Rio Vista jobsite. Mustang's president, Foster, testified that

¹ Mustang President Jimmy Foster testified that he does occasional small pile driving jobs when specifically requested to do so, but that pile driving is a minor part of his business.

² The machine is actually operated by an employee represented by the Operating Engineers Union.

³ This case is now on appeal before the United States Court of Appeals for the Ninth Circuit.

the Pile Drivers had also made several verbal claims for the wick drain work. In June 1991, Foster, during a visit from Laborers official Koenig, explained the pressure he was receiving from the Pile Drivers and asked that the Laborers would so if he changed the assignment of the disputed work from the Laborers to the Pile Drivers. Koenig's reaction was to threaten Mustang with picketing if Foster changed the assignment of the wick drain work.⁴ Foster filed the instant charge after having received that threat.

B. Work in Dispute

The parties did not stipulate to the work in dispute. The Laborers refused to stipulate because its position is that there is no dispute. The notice of hearing described the disputed work as "all work involving the cutting of soil drainage wicks installed by Mustang Construction, Inc. at its construction sites located in Northern California." The hearing officer described the work the same way; however, Mustang claims in its brief that the work in dispute actually concerns the loading, cutting, and handling of the wicks and associated equipment. We find, based on the testimony adduced at the hearing, that the work in dispute should be defined as "all work involving the cutting and the re-anchoring of the soil drainage wicks when the wicks are installed by the static vibro machine."

C. Contentions of the Parties

Mustang contends that there is reasonable cause to believe that the Laborers violated Section 8(b)(4)(D) of the Act by threatening to picket should Mustang change the assignment of work to employees represented by the Pile Drivers, and that the Board must therefore determine the merits of the dispute. It further contends that the work in dispute should be awarded employees represented by the Laborers on the basis of Mustang's preference and past practice, its collective-bargaining agreement with the Laborers, the relative skills of both groups of employees, and economy and efficiency of operations.

The Laborers contends that there is no jurisdictional dispute, as there are no competing claims to the disputed work. In the event the Board finds there to be a jurisdictional dispute, the Laborers asserts that the work should continue to be assigned to employees it represents, in accordance with the preference of the employer, the parties' collective-bargaining agreement, past practice, and the considerations of economy and efficiency.

The Pile Drivers did not appear at the hearing.

⁴Foster testified that Laborers official Don Payne reiterated this threat shortly thereafter.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As discussed above, testimony was presented in this case that the Laborers threatened to picket Mustang's jobsites if the disputed work were reassigned to the Pile Drivers. There was also testimony that the Pile Drivers, in addition to making verbal claims to the work in dispute, filed a grievance against Mustang on May 2, 1991, protesting the assignment of the work at the Rio Vista jobsite. Thus, we find reasonable cause to believe that there are competing claims for the work and that a violation of Section 8(b)(4)(D) has occurred. We also find that no agreed method for voluntary adjustment of the dispute exists within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There are no certifications in this case applicable to the work in dispute. Mustang and the Laborers are parties to a master collective-bargaining agreement which encompassed the work in dispute and is not limited to any particular project. Mustang signed an agreement with the Pile Drivers in 1986 for the Centrum Office project, but Foster testified that it was understood to cover that project only and that it expired at the completion of that project. In light of our award of the work in dispute, *infra*, we need not determine whether Mustang is currently party to a contract with Pile Drivers as well as Laborers covering the work in dispute. Rather, we assume *arguendo* that Mustang is currently party to agreements with both Unions, and we do not rely on this factor in awarding the disputed work.

2. Company preference and past practice

Foster testified that after Mustang began to use the static vibro device in the summer of 1986, it used em-

ployees represented by the Laborers to perform the wick work in front of that machine. Mustang has never used employees represented by Pile Drivers to perform work with the static vibro device, as there is no pile driving involved. He also stated that Mustang has been satisfied with the work performed by these employees and that he prefers to continue to assign the work to employees represented by the Laborers. We find the factor of company preference and past practice favors an award of the work in dispute to the employees represented by the Laborers.

3. Area and industry practice

C. Russel Joiner, president of Geotechnics America, Inc., the developer of the static vibro device, testified that Geotechnics and Mustang are the only companies in the United States currently using the static vibro device to install wick drains. He also testified that Geotechnics customarily assigns the disputed work to employees represented by the Laborers. Under these circumstances, we find that these factors favor an award of the disputed work to employees represented by the Laborers.

4. Relative skills

It appears that both the employees represented by the Laborers and the employees represented by the Pile Drivers possess the requisite skills for performing the work in front of the static vibro machine. Foster testified that he considers employees represented by the Pile Drivers to be “overskilled” to perform the work, and that the employees represented by the Laborers are performing the work in a skillful and competent manner. This factor does not support an award of the work to either group of employees.

5. Economy and efficiency of operations

Foster testified that it is more efficient to use employees represented by the Laborers because the Laborers’ agreement calls for only one person in front of the machine. He also testified that his understanding is that the Pile Drivers’ agreement calls for a crew of four or more people. There is contrary evidence. This factor favors an award of the disputed work to employees represented by the Laborers.

6. Arbitration awards

In 1990 an arbitrator upheld a grievance of the Pile Drivers concerning Mustang’s assignment of the disputed work at another of its jobs, i.e., Project 36. The Employer chose not to participate in that arbitration and has challenged the award in the courts. More significantly, the Laborers was not a party to that arbitration and there is no evidence that it agreed to be bound

by the results. Accordingly, the arbitrator’s award is not binding on the Board.⁵

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of company preference and past practice, industry practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members.

Scope of the Award

Mustang has requested a broad work award, covering work at all its construction sites located within the geographic scope of the Laborers agreement, that is, the 47 northern California counties specified in that agreement. We find such an award inappropriate. The labor organization which engaged in the 8(b)(4)(D) coercion—the Laborers—is the organization that represents the employees to whom we are awarding the work and to whom Mustang wishes to continue to assign it. The other labor organization—the Pile Drivers—has engaged in no unlawful activity, nor has it indicated any proclivity to do so. In such circumstances, the Board has declined to issue an areawide award. See *Carpenters Ventura County District Council (C & W Fence)*, 296 NLRB 1091 (1989), and cases cited therein. Accordingly, the award is limited to Mustang’s work at the Rio Vista jobsite, the only jobsite for which there is evidence of competing claims for the work.⁶

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by the Northern California District Council of Laborers, Laborers’ International Union of North America, AFL–CIO are entitled to perform the work involving the cutting and reanchoring of the soil drainage wicks when the wicks are installed by the static vibro machine, for Mustang Construction, Inc., at its Rio Vista, California jobsite.

⁵ *Laborers Local 1086 (Dentinger, Inc.)*, 282 NLRB 633, 635 (1987); *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1146 (1980).

⁶ Although Mustang asserted that there were also competing claims to the work at Job 44, Mustang President Foster, when asked directly whether the Pile Drivers had claimed the work at that site, testified that it had not.